

Memorandum 98-42

Court-Authorized Health Care Decisions

At the April meeting, the Commission decided to consider expanding the scope of the court-authorized medical treatment procedure in Probate Code Sections 3200-3211 to cover withholding or withdrawing life-sustaining treatment. This memorandum introduces this subject. A preliminary draft of one approach to accomplishing the expanded scope is attached as an Exhibit. After reviewing the issues discussed in this memorandum, we plan to work through the draft as a way to raise and consider a number of practical issues.

Background

The original intent of this procedure, as described in the Commission's Comment preceding Section 3200, was as follows:

The provisions of this part afford an alternative to establishing a conservatorship of the person where there is no ongoing need for a conservatorship. The procedural rules of this part provide an expeditious means of obtaining authorization for medical treatment while safeguarding basic rights of the patient: The patient has a right to counsel.... The hearing is held after notice to the patient, the patient's attorney, and such other persons as the court orders.... The court may determine the issue on medical affidavits alone if the attorney for the petitioner and the attorney for the patient so stipulate.... The court may not order medical treatment under this part if the patient has capacity to give informed consent to the treatment but refuses to do so....

This procedure was first enacted in 1979 on recommendation of the Commission. See 1979 Cal. Stat. ch. 726, § 3; *Recommendation Relating to Guardianship-Conservatorship Law*, 14 Cal. L. Revision Comm'n Reports 501, 577-78 (1978); *Guardianship-Conservatorship Law with Official Comments*, 15 Cal. L. Revision Comm'n Reports 451, 540-41, 870-76 (1980). The procedure was repealed and reenacted in 1990 when the new Probate Code replaced the former Probate Code. See 1990 Cal. Stat. ch. 79, § 14. Coverage was extended to mental health, operative in 1991. See 1990 Cal. Stat. ch. 710, § 12; *Recommendation Relating to*

Court-Authorized Medical Treatment, 20 Cal. L. Revision Comm'n Reports 537 (1990).

Some additional amendments have been made to the original procedure, mainly as a result of the Due Process in Competency Determinations Act (DPCDA) (1995 Cal. Stat. ch. 842, §§ 9-11), which revised the procedural rules in Sections 3201, 3204, and 3208 related to determinations of capacity to make health care decisions ("give informed consent").

Scope of Section 3200 Procedure

The authority of the court, or a surrogate appointed by the court, to authorize medical treatment under the Section 3200 procedure is not as broad as a conservator with full powers, an agent under a power of attorney for health care, or a statutory surrogate under the proposed Health Care Decisions Law. Where the conservatee has been adjudicated to lack the capacity to give informed consent to medical treatment, a conservator under Section 2355 can authorize removal of life-sustaining treatment (i.e., refuse consent to further treatment), if the decision is made in good faith and is based on appropriate medical advice. *Conservatorship of Drabick*, 200 Cal. App. 3d 185, 216-17, 245 Cal. Rptr. 840 (1988); see also *Conservatorship of Morrison*, 206 Cal. App. 3d 304, 309-10, 253 Cal. Rptr. 530 (1988).

An agent under a power of attorney for health care may be given explicit power to consent to withdrawal of life-sustaining treatment, and an agent with full powers has that authority without the need for a specific grant in the power of attorney instrument. See Prob. Code § 4720. The agent must act "consistent with the desires of the principal as expressed in the durable power of attorney or otherwise made known" to the agent, but "if the principal's desires are unknown, to act in the best interests of the principal." *Id.* subdivision (c). These principles are continued in the Commission's tentative recommendation on Health Care Decisions Law.

The Section 3200 procedure has not been interpreted by the appellate courts to permit withholding or withdrawing life support. The statutory language is clearly directed toward care needed to maintain health that does not fall into the category of emergency care. Section 3208 permits an order authorizing the "recommended course of medical treatment" and "designating a person to give consent to the recommended course of medical treatment" if all of the following are determined from the evidence:

(1) The existing or continuing medical condition of the patient requires the recommended course of medical treatment.

(2) If untreated, there is a probability that the condition will become life-endangering or result in a serious threat to the physical or mental health of the patient.

(3) The patient is unable to give an informed consent to the recommended course of treatment.

The reference to the probability that the condition will become life-endangering is clearly not designed to address the situation of the patient in a persistent vegetative state whose continued existence is not seriously threatened. Since the Section 3200 procedure is not designed to deal with end-of-life decisionmaking, there is no statutory procedure available for making decisions in the best interest of a patient in a persistent vegetative state, short of appointment of a conservator with full powers under Section 2355. Appointment of a conservator is usually not a feasible alternative because of the expense and the lack of a person willing to serve as the conservator of the person.

We also understand that principles of medical ethics and concepts involving administration of futile care in the hospital setting can resolve the issue over time. See, e.g., 1 A. Meisel, *The Right to Die* § 5.1, at 164-66 (2d ed. 1995); 2 A. Meisel, *id.* §§ 19.1-19.2, at 530-33. We do not suggest that court approval should be required or that it should replace the appropriate exercise of medical discretion in accordance with generally accepted standards of practice. The leading appellate cases in California have repeatedly disclaimed any desire or need to be involved in all such decisions. But there are cases where court review could be desirable from a public policy standpoint and to provide an alternative for physicians and health care institutions, and other interested persons, to obtain a judicial resolution of a difficult problem.

Terminology

The Section 3200 procedure uses terminology consistent with other parts of the Guardianship-Conservatorship Law (GCL), particularly Section 2357 (court-ordered medical treatment for person with conservator of the person). This reflects the history of the procedure; since it was designed to fill a gap in the GCL, it naturally used the language of related provisions. From our vantage point following enactment and amendment of the durable power of attorney for health care statute in the last 15 years and our study of the Uniform Health-Care Decisions Act, the older GCL language, dating from the late '70s seems

restrictive. For example, the newer statutes refer to “health care” and “health care institutions,” while the GCL refers to “medical treatment,” “medical facts,” “medical affidavit,” “medically available alternatives,” “medical condition,” and “medical facility.” We doubt that the courts would find a substantive limitation with this language, but ideally we should use the same concepts, properly defined, in all of these related statutes. The attached working draft adopts a number of revisions in terminology, but preserves some of the existing language.

Scope of Study

Initially, the staff had set out to revise the Section 3200 procedure to adopt the language of the statute tentatively proposed in the Commission’s Health Care Decisions Law. The purpose of this memorandum is to raise issues concerning the scope of the Section 3200 procedure. However, that procedure is made consistent with the proposed statute, a new tension is created between the medical decision law in the GCL proper and the supplementary Section 3200 procedure. This, in turn, suggests that it might be worthwhile to review all of the GCL rules concerning health care decisions.

The Commission should consider whether to review the related Guardianship-Conservatorship Law provisions. The staff anticipates that the revisions would be largely in terminology, with no major substantive effect. However, the GCL statutory rules governing the making of health care decisions by guardians and conservators suffer from the same doubt affecting the Section 3200 procedure. As noted above, the courts have ruled that a conservator of the person of an incapacitated patient has the right and duty to make health care decisions, including decisions concerning the withholding or withdrawal of life sustaining treatment, but the statutory language is not literally clear on the point. If the scope of the Section 3200 procedure is broadened and if the surrogate rules in the proposed Health Care Decisions Law are enacted, it would be beneficial if the GCL provisions were revised to codify the case law, making them generally consistent with the other rules.

Alternative Drafting Approach

The attached working draft leaves the Section 3200 procedure in place. However, from a drafting standpoint, it would be more elegant to integrate this procedure into Part 3 (commencing with Section 4750) governing judicial proceedings under the proposed Health Care Decisions Law. This would avoid

the overlap between the two procedures and provide a more logical organization scheme. When the Section 3200 procedure was first enacted, it made sense to append it to the GCL because it applied only to situations where medical treatment was needed for an adult without a conservator. But since 1995, Section 3201 has also provided for a determination of capacity to give informed consent, without any proposed medical treatment.

Proposed Section 4766(a) in the tentative recommendation on the Health Care Decisions Law also provides generally for determining whether the patient has capacity to make health care decisions. We don't need two distinct procedures for making this determination. Furthermore, the general subject of health care decisionmaking for incapacitated adults is covered by the tentative recommendation, providing a better place for the Section 3200 procedure. Finally, both an expanded Section 3200 procedure and the tentative recommendation would attempt to deal with the problem of health care decisionmaking for the "friendless" patient, the patient who has no surrogate. If the surrogate committee proposal cannot be implemented, the court procedure of the Section 3200 type would be a useful addition to the Health Care Decisions Law. (In this connection, see the attached letter from Leah V. Granof reporting on the discussion of the surrogate committee proposal by the State Bar Estate Planning, Trust and Probate Law Section Executive Committee. Exhibit pp. 11-12.)

Respectfully submitted,

Stan Ulrich
Assistant Executive Secretary

Exhibit

☞ **Staff Note.** This exhibit includes a working draft showing one alternative approach to expand the scope of the Section 3200 procedure to cover all health care decisions, including end-of-life decisions, as discussed in Memorandum 98-42. The original Commission Comments are also included.

Also included, at Exhibit pp. 11-12, is a letter from Leah V. Granof reporting some preliminary comments of the State Bar Estate Planning Trust and Probate Law Section Executive Committee.

DIVISION 4. GUARDIANSHIP, CONSERVATORSHIP,
AND OTHER PROTECTIVE PROCEEDINGS

Heading amended

SEC. _____. The heading for Part 7 (commencing with Section 3200) of Division 4 of the Probate Code is amended to read:

~~PART 7. AUTHORIZATION OF MEDICAL TREATMENT
CAPACITY DETERMINATIONS AND HEALTH CARE
DECISIONS FOR ADULT WITHOUT CONSERVATOR~~

Comment. The part heading is amended to reflect the expanded scope of this part. See 1995 Cal. Stat. ch. 842, § 9 (adding capacity determinations as independent grounds for petition under Section 3201).

Comment (1990). This part supersedes Part 7 (commencing with Section 3200) of Division 4 of the repealed Probate Code. The superseded part was enacted upon recommendation of the California Law Revision Commission. See *Recommendation Relating to Guardianship-Conservatorship Law*, 14 Cal. L. Revision Comm'n Reports 501 (1978). See also *Report of Assembly Committee on Judiciary on Assembly Bills Nos. 261 and 167*, republished in 15 Cal. L. Revision Comm'n Reports 1061, 1091 (1980). For the Guardianship-Conservatorship Law as enacted in 1979 (Chapter 726 of the Statutes of 1979) with the revisions made by Chapters 89 and 246 of the Statutes of 1980, see *Guardianship-Conservatorship Law*, 15 Cal. L. Revision Comm'n Reports 451 (1980).

The provisions of this part afford an alternative to establishing a conservatorship of the person where there is no ongoing need for a conservatorship. The procedural rules of this part provide an expeditious means of obtaining authorization for medical treatment while safeguarding basic rights of the patient: The patient has a right to counsel. Section 3205. The hearing is held after notice to the patient, the patient's attorney, and such other persons as the court orders. Section 3206. The court may determine the issue on medical affidavits alone if the attorney for the petitioner and the attorney for the patient so stipulate. Section 3207. The court may not order medical treatment under this part if the patient has capacity to give informed consent to the treatment but refuses to do so. Section 3208(b).

§ 3200 (amended). Definitions

SEC. _____. Section 3200 of the Probate Code is amended to read:

3200. As used in this part, “patient” part:

(a) “Health care” means any care, treatment, service, or procedure to maintain, diagnose, or otherwise affect a patient’s physical or mental condition.

(b) “Health care decision” means a decision regarding the patient’s health care, including the following:

(1) Selection and discharge of health care providers and institutions.

(2) Approval or disapproval of diagnostic tests, surgical procedures, programs of medication, and orders not to resuscitate.

(3) Directions to provide, withhold, or withdraw artificial nutrition and hydration and all other forms of health care.

(c) “Health care institution” means an institution, facility, or agency licensed, certified, or otherwise authorized or permitted by law to provide health care in the ordinary course of business.

(d) “Patient” means an adult who does not have a conservator of the person and who is in need of medical treatment for whom health care decision may need to be made.

Comment. Section 3200 is amended to adopt definitions that are consistent with the Health Care Decisions Law. See Section 4500 *et seq.* The definition of “health care decision” in subdivision (b) makes clear, as used in other provisions in this part, that court authorized health care decisions include end-of-life decisions. See Section 3208(b). This is consistent with the scope of the Health Care Decisions Law.

☞ **Staff Note.** Another approach would be to define “medical treatment” to mean “health care” as defined in Section 4615 of the tentatively proposed Health Care Decisions Law. Then, in the following sections, it would not be necessary to replace “medical treatment” and similar terms with the language of the Health Care Decisions Law.

§ 3201. Petition for court authorization; construction and application of part and chapter

SEC. _____. Section 3201 of the Probate Code is amended to read:

3201. (a) A petition may be filed to determine that a patient has the capacity to give informed consent to a specified medical treatment for make a health care decision concerning an existing or continuing medical condition.

(b) A petition may be filed to determine that a patient lacks the capacity to give informed consent to a make a health care decision concerning specified medical treatment for an existing or continuing medical condition, and further for an order authorizing a designated person to give consent to such the treatment on behalf of the patient.

(c) One proceeding may be brought under this part under both subdivisions (a) and (b).

(d) In determining whether a ~~person’s~~ patient’s mental functioning is so severely impaired that the ~~person~~ patient lacks the capacity to give informed consent to any form of medical treatment make any health care decision, the court may take into consideration the frequency, severity, and duration of periods of impairment.

(e) Nothing in this part shall ~~supersede~~ supersedes the right that any person may have under existing law to make ~~medical~~ health care decisions on behalf of a patient, or ~~affect~~ affects the decisionmaking process of a long-term health care facility, as defined in [subdivision (b) of Section 1418.8 of the Health and Safety Code].

(f) This ~~chapter~~ part is permissive and cumulative for the relief to which it applies.

(g) Nothing in this part shall be construed to supersede or impair the right of any individual to choose treatment by spiritual means in lieu of medical treatment, nor shall any ~~person~~ individual choosing treatment by spiritual means, in accordance with the tenets and practices of that individual's established religious tradition, be required to submit to medical testing of any kind pursuant to a determination of competency.

Comment. Section 3201 is amended to use the terminology of Section 3200. See Section 3200 Comment. Other technical, nonsubstantive changes are also made.

Comment (1990). Section 3201 continues Section 3201 of the repealed Probate Code without change. This section is similar to a portion of subdivision (b) of Section 2357. For background on the provisions of this part, see the Comment to this part under the part heading.

In the ordinary, nonemergency case, medical treatment may be given to a person only with the person's informed consent. See *Cobbs v. Grant*, 8 Cal. 3d 229, 502 P.2d 1, 104 Cal. Rptr. 505 (1972). If the person is incompetent or is otherwise unable to give informed consent and has no conservator, the physician may be willing to proceed with the consent of the person's nearest relative. See *id.* at 244, 502 P.2d at 10, 104 Cal. Rptr. at 514. However, if treatment is not available because of a question of the validity of the consent, court intervention may be needed to authorize the treatment and to protect medical personnel and facilities from later legal action based upon asserted lack of consent.

Staff Note

(1) The Health Care Decisions Law, like the Uniform Health-Care Decisions Act, does not use the term "informed consent." The doctrine of informed consent applies without the need to refer to it every time "consent" is used.

(2) Subdivisions (a) and (b) could be combined conceptually into a statement of authority to determine *whether or not* the patient has capacity. The existing construction is awkward, although it does emphasize the option of seeking to establish capacity, consistent with the concerns of the DPCDA legislation.

(3) Subdivisions (d)-(g) are misplaced. Subdivision (d) should not be in this scope provision, but in the section governing the court's determinations (Section 3208) or elsewhere. Subdivision (e) duplicates Section 3210 and should be merged with it. Subdivisions (f) and (g) should be placed with the other limitations on this part, like Section 3211, at the end of the part. Subdivision (f) erroneously refers to "chapter."

(4) Subdivisions (b) refers to the "Epple bill" procedure that would be replaced by the surrogacy committee in the Commission's tentative recommendation.

(5) The Commission Comment, dating from 1990, obviously does not reflect the amendments made in 1995 and 1996. However, the second paragraph of the Comment remains accurate and is an important statement of legislative intent that has been cited in other authorities as legislative approval of the dictum in *Cobbs v. Grant*.

§ 3202 (unchanged). Jurisdiction and venue

3202. The petition may be filed in the superior court of any of the following counties:

- (a) The county in which the patient resides.
- (b) The county in which the patient is temporarily living.
- (c) Such other county as may be in the best interests of the patient.

Comment (1990). Section 3202 continues Section 3202 of the repealed Probate Code without change. This section provides liberal venue rules for determining the county in which the petition is to be filed. See also the Comment to Section 2201. For background on the provisions of this part, see the Comment to this part under the part heading.

§ 3203 (amended). Persons authorized to file petition

SEC. _____. Section 3203 of the Probate Code is amended to read:

3203. A petition may be filed by any of the following:

- (a) The patient.
- (b) The patient's spouse ~~of the patient~~.
- (c) A relative or friend of the patient or other interested person.
- (d) The patient's physician.
- (e) A person acting on behalf of the ~~medical facility~~ health care institution in which the patient is located if the patient is in a ~~medical facility~~ health care institution.
- (f) The public guardian or such other county officer as is designated by the board of supervisors of the county in which the patient is located or resides or is temporarily living.

Comment. Section 3203 is amended to use the terminology of Section 3200. See Section 3200 Comment. Other technical, nonsubstantive changes are also made.

Comment (1990). Section 3203 continues Section 3203 of the repealed Probate Code without change. This section permits any interested person to file a petition under this part, including a person acting on behalf of the medical facility if the patient is in a medical facility. For background on the provisions of this part, see the Comment to this part under the part heading.

§ 3204 (amended). Contents of petition

SEC. _____. Section 3204 of the Probate Code is amended to read:

3204. The petition shall state, or set forth by [medical] declaration attached thereto, all of the following ~~so far as is known to the petitioner at the time the petition is filed:~~

- (a) The nature of the patient's [medical] condition ~~of the patient which that~~ requires treatment.
- (b) The recommended ~~course of medical treatment which~~ health care that is considered to be [medically] appropriate.
- (c) The threat to the patient's health ~~of the patient~~ if authorization for the recommended ~~course of treatment~~ health care is delayed or denied by the court.
- (d) The predictable or probable outcome of the recommended ~~course of treatment~~ health care.

(e) The [medically available] alternatives, if any, to the ~~course of treatment~~ recommended health care.

(f) The efforts made to obtain [an informed] consent from the patient.

(g) If the petition is filed by a person on behalf of a ~~medical facility~~ health care institution, the name of the person to be designated to give consent to the recommended ~~course of treatment~~ health care on behalf of the patient.

(h) The deficit or deficits in the patient's mental functions listed in subdivision (a) of Section 811 ~~which that~~ are impaired, and ~~identifying~~ identification of a link between the deficit or deficits and the patient's inability to respond knowingly and intelligently to queries about the recommended ~~medical treatment~~ health care or inability to participate in a ~~treatment~~ decision about the recommended ~~medical treatment~~ health care by means of a rational thought process.

(i) The names and addresses, so far as they are known to the petitioner, of the persons specified in subdivision (b) of Section 1821.

Comment. Section 3204 is amended to use the terminology of Section 3200. See Section 3200 Comment. Other technical, nonsubstantive changes are also made.

Comment (1990). Section 3204 continues Section 3204 of the repealed Probate Code without change. This section is comparable to subdivision (c) of Section 2357. See also Sections 1020-1023 (petitions and other papers). For background on the provisions of this part, see the Comment to this part under the part heading.

☞ **Staff Note.** The meaning of "medical declaration" is not readily apparent to the staff. Is it intended to be a declaration by a physician? Or is it just the name of the declaration required by this section, in which case "medical" is really surplus.

The 1990 Comment is mostly obsolete.

§ 3205 (unchanged). Appointment of legal counsel

3205. Upon the filing of the petition, the court shall determine the name of the attorney the patient has retained to represent the patient in the proceeding under this part or the name of the attorney the patient plans to retain for that purpose. If the patient has not retained an attorney and does not plan to retain one, the court shall appoint the public defender or private counsel under Section 1471 to consult with and represent the patient at the hearing on the petition and, if such appointment is made, Section 1472 applies.

Comment (1990). Section 3205 continues Section 3205 of the repealed Probate Code without change. For background on the provisions of this part, see the Comment to this part under the part heading.

§ 3206 (amended). Notice of hearing

SEC. _____. Section 3206 of the Probate Code is amended to read:

3206. (a) Not less than 15 days before the hearing, notice of the time and place of the hearing and a copy of the petition shall be personally served on the patient and the patient's attorney.

(b) Not less than 15 days before the hearing, notice of the time and place of the hearing and a copy of the petition shall be mailed to the following persons:

(1) The patient's spouse, if any, ~~of the proposed conservatee~~ at the address stated in the petition.

(2) The patient's relatives named in the petition at their addresses stated in the petition.

(c) For good cause, the court may shorten or waive notice of the hearing as provided by this section. In determining the period of notice to be required, the court shall take into account both of the following:

(1) The existing medical facts and circumstances set forth in the petition or in a medical affidavit declaration attached to the petition or in a medical affidavit declaration presented to the court.

(2) The desirability, where the condition of the patient permits, of giving adequate notice to all interested persons.

Comment. Subdivision (b) of Section 3206 is amended to correct the reference to a “proposed conservatee.” See Section 3200(d) (“patient” defined).

Subdivision (c) is amended to replace the references to “affidavit,” in conformity with Section 3204.

☞ **Staff Note.** Where the court is considering whether to order or permit removal of life sustaining treatment, should an order shortening time or dispensing with notice be permitted?

There is no Comment to this section because the older Section 3206 was repealed and this Section 3206 was added as part of the DPCDA legislation in 1995.

§ 3207 (amended). Submission for determination on medical affidavits

SEC. _____. Section 3207 of the Probate Code is amended to read:

3207. Notwithstanding Section 3206, the matter presented by the petition may be submitted for the determination of the court ~~upon~~ on proper and sufficient medical affidavits ~~or declarations~~ if the attorney for the petitioner and the attorney for the patient so stipulate and further stipulate that there remains no issue of fact to be determined.

Comment. Section 3207 is amended to eliminate the reference to “affidavits,” in conformity with Section 3204.

Comment (1990). Section 3207 continues Section 3207 of the repealed Probate Code without change. This section is comparable to subdivision (g) of Section 2357. For background on the provisions of this part, see the Comment to this part under the part heading.

☞ **Staff Note.** Where the court is considering whether to order or permit removal of life sustaining treatment, should the summary proceeding of this section be allowed?

§ 3208 (amended). Order authorizing treatment

SEC. _____. Section 3208 of the Probate Code is amended to read:

3208. (a) ~~The~~ Except as provided in subdivision (b), court may make an order authorizing the recommended course ~~of medical treatment of~~ health care for the patient and designating a person to give consent to the recommended ~~course of medical treatment~~ health care on behalf of the patient if the court determines from the evidence all of the following:

(1) The existing or continuing medical condition of the patient requires the recommended course of medical treatment health care.

(2) If untreated, there is a probability that the condition will become life-endangering or result in a serious threat to the physical or mental health of the patient.

(3) The patient is unable to [give an informed] consent to the recommended course of treatment health care.

(b) The court may make an order authorizing withdrawal or withholding of artificial nutrition and hydration and all other forms of health care and designating a person to give or withhold consent to the recommended course of health care on behalf of the patient if the court determines from the evidence all of the following:

(1) The recommended health care is in accordance with the patient's best interest, taking into consideration the patient's personal values to the extent known.

(2) The patient is unable to [give an informed] consent to the recommended health care.

~~(b) If the patient has the capacity to give informed consent to the recommended course of medical treatment, the court shall so find in its order.~~

~~(c) If the court finds that the patient has the capacity to give informed consent to the recommended course of medical treatment, but that the patient refuses consent, the court shall not make an order authorizing the course of recommended medical treatment or designating a person to give consent to such treatment. If an order has been made authorizing the recommended course of medical treatment and designating a person to give consent to that treatment, the order shall be revoked if the court determines that the patient has recovered the capacity to give informed consent to the recommended course of medical treatment. Until revoked or modified, the order is effective authorization for the course of medical treatment.~~

~~(d) In a proceeding under this part, where the court has determined that the patient has the capacity to give informed consent, the court shall, if requested, determine whether the patient has accepted or refused the recommended course of treatment, and whether a patient's consent to the recommended course of treatment is an informed consent.~~

Comment. Subdivision (a) is amended to use the terminology of Section 3200. See Section 3200 Comment. Other technical, nonsubstantive changes are also made.

A new subdivision (b) is added to permit withholding or withdrawal of health care, including artificial nutrition and hydration. This amendment extends the authority of the court to authorize health care decisions to the same extent as surrogates and subject to the same standards as provided in the Health Care Decisions Law. See, e.g., Sections 4685 (standard governing agent's health care decisions under power of attorney for health care), 4713 (standard governing surrogate's health care decisions).

Former subdivisions (b)-(d) are continued in Section 3208.5 without substantive change. See Section 3208.5 Comment.

Comment (1990 enactment). Section 3208 continues Section 3208 of the repealed Probate Code without change. Subdivision (a) is comparable to subdivision (h) of Section 2357. The person designated to give consent may be called upon to make decisions on particular matters that

arise within the authorized course of medical treatment. Subdivision (b) makes clear that this part applies only to the case where the patient either lacks capacity to give informed consent or is in such condition that the patient is unable to give consent. For background on the provisions of this part, see the Comment to this part under the part heading.

Comment (1990 amendment). Section 3208 (enacted as a part of the new Probate Code by 1990 Cal. Stat. ch. 79 § 14) was amended by 1990 Cal. Stat. ch. 710 § 12. The amendment expanded subdivision (a)(2) to include a serious threat to mental health as a condition that justifies court authorization of medical treatment. See also Section 2357. For background on the 1990 amendment, see Recommendation Relating to Court-Authorized Medical Treatment, 20 Cal. L. Revision Comm'n Reports 537 (1990).

☞ **Staff Note.** New subdivision (b), along with the definition of health care, would accomplish the expansion of the scope of this procedure to cover end-of-life decisions.

Some of the old Comment material relates to material continued in the next section.

§ 3208.5 (added). Effect of order determining that patient has capacity

SEC. _____. Section 3208.5 is added to the Probate Code, to read:

3208.5. In a proceeding under this part:

(a) Where the patient has the capacity to [give informed] consent to the recommended health care, the court shall so find in its order.

(b) Where the court has determined that the patient has the capacity to [give informed] consent to the recommended health care, the court shall, if requested, determine whether the patient has [accepted] or refused the recommended health care, and whether a patient's consent to the recommended health care is an informed consent.

(c) Where the court finds that the patient has the capacity to [give informed] consent to the recommended health care, but that the patient refuses consent, the court shall not make an order authorizing the recommended health care or designating a person to give consent to the recommended health care. If an order has been made authorizing the recommended health care and designating a person to give consent to the recommended health care, the order shall be revoked if the court determines that the patient has recovered the capacity to [give informed] consent to the recommended health care. Until revoked or modified, the order is effective authorization for the recommended health care.

Comment. Section 3208.5 continues former subdivisions (b)-(d) of Section 3208 without substantive change. The subdivisions have been placed in a different order. Terminology has been conformed to the definitions in Section 3200. Thus, for example, "health care" replaces "medical treatment" appearing in the former provision.

☞ **Staff Note.** These rules need more redrafting work. In 1995, DPCDA grafted some ideas on the older rules, but the overlap and gaps were not worked out. Inconsistent drafting of these subdivisions can lead to confusion. For example, the Section 3208(d) begins "In a proceeding under this part...", whereas the subdivisions (b) and (c) do not include this language. The draft above places this language in an introductory clause, although it is really surplus, since everything in this part relates to proceedings under this part.

§ 3209 (unchanged). Continuing jurisdiction of court

3209. The court in which the petition is filed has continuing jurisdiction to revoke or modify an order made under this part upon a petition filed, noticed, and heard in the same manner as an original petition filed under this part.

Comment (1990). Section 3209 continues Section 3209 of the repealed Probate Code without change. This section gives the court continuing jurisdiction to make such further orders as are necessary concerning medical treatment of the patient. If the court determines that the patient has recovered capacity to give informed consent, the order under this part must be revoked. Section 3208(b). The patient can then determine whether to consent or to refuse to consent to continuation of treatment. For background on the provisions of this part, see the Comment to this part under the part heading.

§ 3210 (amended). Procedure supplemental and alternative

SEC. _____. Section 3210 of the Probate Code is amended to read:

3210. (a) This part is supplemental and alternative to other procedures or methods for obtaining ~~medical consent~~ health care or making health care decisions.

(b) Nothing in this part limits the providing of ~~medical treatment~~ health care in an emergency case in which the ~~medical treatment~~ health care is required because (1) such the treatment health care is required for the alleviation of severe pain or (2) the patient has a medical condition ~~which that~~, if not immediately diagnosed and treated, will lead to serious disability or death.

Comment. Section 3210 is amended to use the terminology of Section 3200. See Section 3200 Comment. Other technical, nonsubstantive changes are also made.

Comment (1990). Section 3210 continues Section 3210 of the repealed Probate Code without change. Subdivision (a) makes clear that this part does not limit other methods for obtaining medical consent. See the Comment to Section 3201.

Subdivision (b) makes clear that this part does not require informed consent of the patient in emergency cases where consent cannot reasonably be obtained. Such cases are governed by other law. See generally *Cobbs v. Grant*, 8 Cal. 3d 229, 502 P.2d 1, 104 Cal. Rptr. 505 (1972).

For background on the provisions of this part, see the Comment to this part under the part heading.

☞ **Staff Note.** In other places, the statutes do not attempt to describe or define “emergency” treatment. Is it wise to do it here? Why should the law be inconsistent?

§ 3211 (amended). Limitations on part

SEC. _____. Section 3211 of the Probate Code is amended to read:

3211. (a) No person may be placed in a mental health treatment facility under the provisions of this part.

(b) No experimental drug as defined in Section 111515 of the Health and Safety Code may be prescribed for or administered to any person under this part.

(c) No convulsive treatment as defined in Section 5325 of the Welfare and Institutions Code may be performed on any person under this part.

(d) No person may be sterilized under this part.

(e) The provisions of this part are subject to ~~any of the following instruments a~~ patient's advance health care directive, if valid and effective:.

~~(1) A directive of the patient under Chapter 3.9 (commencing with Section 7185) of Part 1 of Division 7 of the Health and Safety Code (Natural Death Act).~~

~~(2) A power of attorney for health care, whether or not a durable power of attorney.~~

Comment. Subdivision (e) of Section 3211 is amended to use the inclusive term "advance health care directive" used in the Health Care Decisions Law. This continues the substance of former law, since declarations under the former Natural Death Act and powers of attorney for health care are types of advance directives. See Section 4605 & Comment. Also covered by this language are "individual health care instructions." See Section 4623 & Comment.

Comment (1990). Section 3211 continues Section 3211 of the repealed Probate Code with the addition of the reference to a power of attorney for health care. This section is comparable to Section 2356 (Guardianship-Conservatorship Law). See the Comment to Section 2356. For background on the provisions of this part, see the Comment to this part under the part heading.

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April 30, 1998

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Stan Ulrich
Assistant Executive Secretary
California Law Revision Commission
4000 Middlefield Road, B-1
Palo Alto, California 94303-4739

Re: First, Second and Third Supplement
to Staff Memorandum 98-16

Dear Stan:

The Executive Committee of the Estate Planning, Trust and Probate Law Section of the California State Bar held its retreat on Friday, April 17, 1998 through Sunday, April 19, 1998. As Chairman of the Special Projects - Advance Directives Committee, I presented the report dated March 2, 1998, which summarized my Committee's decisions on the CLRC Staff Memorandum 98-16.

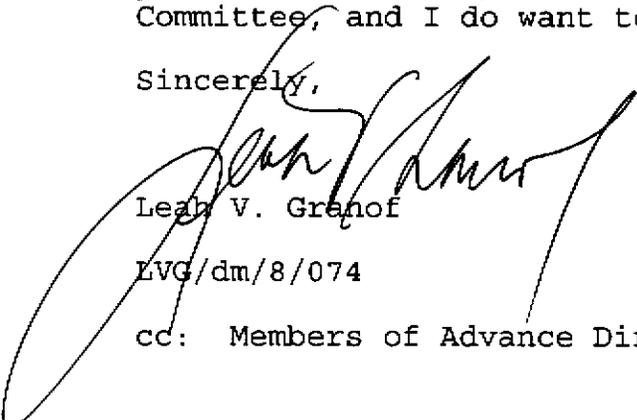
I also presented to the Executive Committee reprints of Robert D. Orr, M.D.'s comments to you regarding Draft Section 4724 which requires a unanimous decision by the Surrogacy Committee with respect to decisions relating to refusal or withdrawal of life-sustaining treatment in the context of the "friendless" patient.

The discussion went on to consider the composition of the Surrogacy Committee and ended with great concern about the category of persons who would qualify to be the person on the Committee to represent the "member of the community". This discussion evolved into two proposals, one whether the community member of the Surrogate Committee should be appointed by the court, or whether a court action should replace in total the Surrogacy Committee.

Stan Ulrich
April 30, 1998
Page two

A vote was taken and, of those voting, 13 voted for court action instead of a decision by the Surrogacy Committee in the case of a "friendless" patient, and further, in the case of health care decisions relating to refusal and withdrawal of life-sustaining treatment. This is a departure from my Committee's unanimous vote for the Surrogacy Committee and its composition as set forth in your Draft Statute, however, this is the position of the Executive Committee, and I do want to inform you of this.

Sincerely,



Leah V. Granof

LVG/dm/8/074

cc: Members of Advance Directives Committee